Supreme Court, U.S.
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No. 00-____

IN THE

Supreme Court of the United States

ATKINSON TRADING COMPANY, INC.,
Petitioner,

v.

JOE SHIRLEY, JR., VICTOR JOE, DERRICK B. WATCHMAN, AND ELROY DRAKE, MEMBERS OF THE NAVAJO TAX COMMISSION; AND STEVEN C. BEGAY, EXECUTIVE DIRECTOR OF THE NAVAJO TAX COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an Indian tribe may tax a transaction occurring between two non-Indians on fee land within the reservation?

RULE 29.6 STATEMENT

Petitioner Atkinson Trading Company, Inc., is a privately owned corporation. It has no parent corporation and no publicly held company owns any stock in the petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Atkinson Trading Company, Inc. ("Atkinson Trading"), respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-51a), is reported at 210 F.3d 1247. The court of appeals' unpublished order denying Atkinson Trading's petition for rehearing and rehearing *en banc* by an equally divided vote is reprinted at App 52a. The opinion and order of the United States District Court for the District of New Mexico (App. 53a-69a) are unreported. The opinion of the Navajo Supreme Court (App. 70a-90a) is unreported. The opinion and order of the Navajo Tax Commission (App. 91a-101a) are unreported.

JURISDICTION

The opinion of the court of appeals was issued on May 2, 2000. In an order dated June 26, 2000, the court of appeals denied Atkinson Trading's timely petition for rehearing or rehearing *en banc*. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

The Navajo Hotel Occupancy Tax, Title 24, Navajo Tribal Code §§ 101-142 (eff. Jan. 1, 1993), is reproduced in its entirety in the Appendix. App. 102a-124a.

STATEMENT OF THE CASE

Petitioner Atkinson Trading, is a non-Indian corporation operating a hotel on its own fee land within the Navajo Indian Reservation (the "Reservation"). Petitioner challenges the authority of respondents, various officials of the Navajo

Indian Nation (the "Tribe"), to tax transactions occurring wholly between non-Indians on that fee land. Specifically, the Tribe seeks to impose a hotel occupancy tax on Atkinson Trading's overnight guests, who are not members of the Tribe. The courts below upheld the tax, despite the fact that the hotel's guests have no commercial relationship with the Tribe.

This holding conflicts with the framework established by this Court in *Montana v. United States*, 450 U.S. 544 (1981), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997). Those cases recognize that the inherent sovereign powers of an Indian tribe are limited to those necessary for tribal self-government. They establish a general presumption that a tribe does not have authority over the activities of a nonmember on fee land within a reservation. While *Montana* recognizes an exception permitting tribal jurisdiction over persons who enter into a consensual commercial relationship with a tribe or its members, the hotel guests here have no such relationships. The Tenth Circuit's ruling—delivered by a split panel and sustained on a 5-5 *en banc* vote—is contrary to Supreme Court precedent, to Ninth Circuit precedent, and to district court decisions involving identical facts.

I. STATEMENT OF FACTS

A. Cameron Trading Post

The Navajo Indian Nation is a federally-recognized Indian tribe with a large reservation spanning parts of Arizona, New Mexico and Utah. App. 96a. Atkinson Trading is a New Mexico corporation principally owned by Edwin J. Atkinson, a non-Indian. App. 95a. Atkinson Trading owns and operates Cameron Trading Post (the "Trading Post"), a hotel and tourist business located near Cameron, Arizona, within the exterior boundaries of the Reservation. App. 96a.

The Trading Post is located in north central Arizona, about 50 miles from the entrance to Grand Canyon National Park. It is adjacent to U.S. Highway 89, about a mile from the intersection with Arizona Highway 64, which leads to the park entrance. The Trading Post consists of a hotel, restaurant, cafeteria, gallery, curio shop, retail store and RV park. App. 96a. Atkinson Trading's "businesses on the property are focused on the tourist market and deal almost exclusively with non-members of the Navajo Nation, who are primarily attracted to the property because of its proximity to the Grand Canyon." *Id.* A significant portion of its hotel business is provided by tour buses that stop overnight either before or after visiting the Grand Canyon. App. 57a.

Atkinson Trading owns the property underlying the hotel in fee simple. App. 96a. Atkinson Trading's title to the property is directly traceable to a fee patent issued by the United States. At the time that the patent was issued, the property was not located within the Navajo Reservation. Nor was the property located within the Reservation when the Trading Post was opened in 1916. Subsequently, however, the external boundaries of the Reservation were extended by Act of Congress; the Reservation now completely surrounds Atkinson Trading's fee land. *See* App. 96a (citing Act of Congress of June 14, 1934, Ch. 521, 48 Stat. 960-62).

Neither Atkinson Trading nor any of its non-Indian guests has any agreement, contractual or otherwise, with the Tribe. *See* App. 65a. Prior to the Navajo Tax Commission hearing, Atkinson Trading's only business with individual tribal members consisted of the employment of Indian workers at the Trading Post, "a small amount of sales to members and a small amount of purchases of arts and crafts." App. 96a. However, Atkinson Trading has not made any purchases of arts and crafts from tribal members since 1995. *Id.*

B. The Tribal Hotel Occupancy Tax

On July 30, 1992, the Navajo Nation Council enacted a Hotel Occupancy Tax ("HOT"), 24 Navajo Tribal Code §§ 101-142 (eff. Jan. 1, 1993) (App. 102a-124a). The HOT "purports to tax all persons who pay for the use or possession of a room or space which costs $2.00 or more per day in a hotel which is located within the exterior boundaries of the Navajo Nation." App. 98a. Hotel guests are required to pay a tax of 8% of the price of the room to the Tribe. 24 Navajo Tribal Code § 103. The tribal code "requires the person who owns, operates, manages or controls a hotel to collect the tax from its guests, remit the tax to the Navajo Tax Commission, file reports on the tax with the Navajo Tax Commission and pay penalties and interest for failure to do so." App. 98a.

The Navajo Tax Commission interprets the HOT to apply to "guests at all hotels within the exterior boundaries of the Navajo Nation without regard to whether it is located on trust or fee land." App. 98a.

II. PROCEDURAL HISTORY

In 1993, Atkinson Trading filed a complaint against the Tribe seeking a declaratory judgment that the Tribe lacked the authority to impose the HOT on the hotel's overnight guests. The United States District Court for the District of New Mexico dismissed the complaint without prejudice, concluding that Atkinson Trading was required to exhaust its tribal remedies. *See Atkinson Trading Co. v. Navajo Nation*, 866 F. Supp. 506 (D.N.M. 1994).

Atkinson Trading then filed an administrative challenge to the HOT before the Navajo Tax Commission ("NTC"). Atkinson Trading contended that its guests were not subject to tribal authority under the general rule of *Montana* because they were nonmembers on fee land. It also argued that the

HOT did not satisfy either of the two exceptions set forth in *Montana*.[1]

After an administrative hearing, the NTC issued findings of fact and conclusions of law, upholding the tax as applied to non-Indian guests at the hotel. *See* App. 91a-100a. The NTC concluded that, under this Court's decision in *Merrion v. Jicarilla Apache Indian Tribe*, 455 U.S. 130 (1982), "the Navajo Nation, in exercising its right of territorial management, has the power to assess a tax on non-Indians within its jurisdiction; i.e., within the exterior boundaries of the Navajo Nation." App. 94a. The NTC rejected Atkinson Trading's argument that *Montana* governs all questions of tribal authority over non-Indian conduct on reservation fee land, concluding that *Montana* "does not serve to limit this general power to tax which was recognized in *Merrion*." App. 94a. Atkinson Trading appealed that decision to the Navajo Supreme Court, which affirmed the NTC's decision. App. 70a-90a.

After exhausting its tribal remedies, Atkinson Trading filed a renewed complaint for declaratory relief in federal district court, invoking federal question jurisdiction under 28 U.S.C. § 1331. On cross motions for summary judgment, the district court affirmed the application of the HOT to petitioner's non-Indian guests. App. 53a-68a. The court reasoned that "the consensual-relationships test of *Montana* and *Strate* is the proper framework within which to analyze this taxation

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[1] The first exception permits a tribe to "regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." *Montana*, 450 U.S. at 565 (citations omitted). The second authorizes civil authority over non-Indian conduct on the reservation "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." *Id.* at 566 (citations omitted).

case." App. 63a. However, it asserted that the "*Merrion* provision-of-services or benefits-of-a-civilized-society factors . . . are relevant to the *Montana* test because they are indicators that the necessary consensual relationship is present . . . ." App. 64a.

The court therefore crafted an entirely new standard for determining tribal tax authority over nonmembers:

> The Court's review of case law concerning tribal jurisdiction over nonmembers indicates that the extent to which a tribe will be allowed to regulate or affect non-Indian activity is often determined on a sliding scale, balancing the impact of the activity on the tribe with the severity of the tribe's proposed regulation, taxation, or other imposition of jurisdiction.

App. 64a. While the district court acknowledged that "[n]o explicit consensual relationship was created between the Tribe and the guests," App. 65a, it held that, under its sliding scale, "where Plaintiff's customers travel onto the reservation, stay overnight, and take advantage of the establishment of a civilized society there, that is consensual activity." *Id.* The court reasoned that "the guests voluntarily put themselves in the position of possibly needing assistance from tribal personnel," including tribal EMS personnel, police officers and fire officials. App. 66a. On the other side of the balance, the court concluded that the "burdens imposed by the Tribe on the nonmember guests . . . are minimal" because "the HOT involves only the payment of a tax of 8% of the room rate." App. 67a.

On appeal, a divided panel of the Tenth Circuit affirmed. App. 1a-51a. Writing for a two-judge majority, Judge McKay adopted the rationale of the district court. First, the court rejected petitioner's argument that the nature of the land within the reservation determined the applicable rule. Atkinson Trading argued that *Montana* and *Strate* govern all assertions of tribal jurisdiction over nonmembers on fee land,

while *Merrion* establishes a separate rule for the authority of a tribe to tax nonmember conduct on *tribal* lands. While recognizing that this Court's decisions "did make an issue of the fee status of the land in question," the majority opined that petitioner's "reading of Supreme Court case law derives from an unwarranted reliance on a coincidence of facts and results . . . ." App. 15a-16a. In its view, "the Supreme Court did not intend that fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation." App. 11a. The court held that *Montana* and *Strate* are "more accurately explained as instances in which the Supreme Court weighed the impact of the nonmember conduct against the severity of tribal regulations." App. 17a. The majority opinion therefore expressly adopted the district court's balancing test. App. 25a-26a.

The majority then applied this balancing test to find an "implied" consensual relationship between petitioner's guests and the Tribe, based upon the guests' acceptance of "the privilege of remaining on the reservation under the protection and accommodation of the services provided by the tribe." App. 29a. The "consensual relationship exists in that the non-member guests could refrain from the privilege of lodging within the confines of the Navajo Reservation and therefore remain free from liability" for the HOT. *Id.* The majority also agreed with the district court that the burden imposed by the tax was not disproportionate to the benefits of the tribal services. App. 30a-31a. Thus, it upheld the Tribe's power to tax petitioner's guests.

Judge Briscoe dissented. "[I]t is clear," she reasoned, "that the analytical framework outlined in *Montana* . . . and reaffirmed in *Strate* . . . , is the proper one to apply." App. 37a. Judge Briscoe criticized the majority opinion for giving mere lip service to the *Montana* analysis: "Although the majority purports to apply the *Montana* framework, it makes

several major missteps in doing so." App. 37a. First, "the majority mistakenly concludes it is irrelevant whether the nonmembers' conduct takes place on tribal land or non-Indian fee land. A proper reading of *Montana* and *Strate* indicates this distinction is, in fact, significant." *Id.* Judge Briscoe pointed to several passages from both decisions that indicated the importance of the status of fee land. App. 37a-38a.

Judge Briscoe further criticized the majority's reliance on *Merrion* to establish its balancing test. "In my view, it is improper to modify the *Montana* framework with any language or 'factors' derived from *Merrion*." App. 41a. She explained the two separate lines of cases:

> *Montana* operates from a presumption that, absent express authority derived from a treaty or statute, a tribe lacks jurisdiction over nonmembers' conduct on nonmember fee land . . . . In contrast, *Merrion* operates from a presumption that a tribe retains inherent sovereign authority to regulate nonmembers' conduct occurring on tribal land, and thus contains no particular 'test' or 'factors' for deciding tribal jurisdiction.

App. 41a-42a. The "majority's newly adopted test," Judge Briscoe reasoned, "subverts the question of whether a consensual relationship exists between the nonmembers and the tribe and replaces it with an entirely different inquiry that, in my view, makes it substantially easier for a tribe to establish jurisdiction over a nonmember." App. 42a.

When properly applied, Judge Briscoe concluded, the *Montana* test invalidates the tax at issue. The first exception to the *Montana* rule, that of "consensual relationships," was not met. With respect to the majority's "implied consent" rationale, Judge Briscoe concluded that "there is no evidence that any of [Atkinson Trading's] non-Indian guests have been provided medical, health protection, or tourism services by the Nation." App. 47a-48a (footnotes omitted).

Atkinson Trading filed a timely petition for rehearing or rehearing *en banc*. In an order dated June 26, 2000, the original panel denied the petition for rehearing. An evenly-divided *en banc* court denied the petition for rehearing *en banc*: "As the active judges split five to five in response to the poll, the suggestion for en banc rehearing fails." App. 52a.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's decision in this case contravenes the principles firmly established by this Court in *Montana v. United States*, 450 U.S. 544 (1981), and *Strate v. A-1 Contractors*, 520 U.S. 438 (1997), governing tribal authority over non-Indians on fee land. In lieu of the "main rule" and exceptions recognized in those cases, the opinion creates an unsupported "sliding scale" standard. By substituting a nebulous balancing test for the bright lines adopted by this Court, the lower court's decision threatens to inject great uncertainty into tribal regulation of *all* non-Indian conduct on reservations throughout the country.

The disagreement within the Tenth Circuit on this issue is reflective of a broader conflict among federal courts. The approach to tribal taxation taken by the majority opinion here is in conflict with that taken by the Ninth Circuit, *see Big Horn County Elec. Coop. v. Adams*, 219 F.3d 944 (9th Cir. 2000), and gives rise to a result squarely inconsistent with decisions in that Circuit. *See In re Haines*, 245 B.R. 401 (D. Mont. 2000); *Rose v. Adams*, No. CV 99-126-BLG-JDS, Order (D. Mont. Aug. 7, 2000) (App. 125a-134a).

The question of whether tribal governments may tax non-Indian conduct on reservation fee land is an important one. Tribes have found taxation of non-Indians an easy source of revenue because non-Indians have no voice in tribal government. As tribal budgetary demands increase, so too does the pressure on tribal leadership to shift the burden of

paying for tribal government to outsiders. The balancing test adopted by the Tenth Circuit makes that shift all the more likely, by permitting tribal taxation of non-Indians by virtue of the mere *possibility* of the receipt of tribal services. This decision opens the floodgate to all manner of tribal taxation of non-Indians, in contravention of the standards established in *Montana* and *Strate*. It should receive immediate review.

I. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH *MONTANA* AND *STRATE*

The court of appeals' decision disregards this Court's fully articulated standard with respect to tribal authority over nonmember conduct on reservation fee land. In its place, the lower court adopted a multi-factor, "case-by-case approach" that has no relationship to prior decisions of this Court. *See* App. 17a.

A. The Court of Appeals Erroneously Refused to Accept the Clear Distinction between Fee and Tribal Lands Established by This Court's Decisions

The court of appeals' most fundamental mistake was its refusal to recognize the pivotal importance of the status of the land in determining the scope of a tribe's civil authority over nonmembers. The court of appeals asserted that this Court "did not intend that the fee status should become the determining factor in cases involving the assertions of tribal sovereign power over nonmembers on the reservation." App. 11a. Rather, "fee status is simply *one* factor a court should consider in applying the *Montana* framework and weighing the interests of the nonmembers against those of the tribe . . . ." App. 16a (emphasis added). Nothing in this Court's jurisprudence, the court concluded, "suggest[s] that fee status is a limitation on the power to tax." *Id.*

This conclusion is plainly inconsistent with this Court's decisions. *Montana* centers the analysis of tribal civil authority on the status of the land:

> The *Montana* Court recognized that the Crow Tribe retained power to limit or forbid hunting or fishing by nonmembers on land still owned by or held in trust for the Tribe. The Court held, however, that the Tribe lacked authority to regulate hunting and fishing on land within the Tribe's reservation *owned in fee simple by non-Indians*.

Strate, 520 U.S. at 446-47 (citations omitted) (emphasis added). Again, in *Strate*, this Court drew a clear distinction between tribal authority over nonmember conduct on tribal lands and tribal authority over nonmember conduct on fee land, holding that the Tribes had no civil jurisdiction over the conduct of nonmembers traveling on a highway that was the "equivalent" of fee land. *See Strate*, 520 U.S. at 454-56. Thus, the distinction between tribal and fee lands has been consistently applied in determining the limits to tribal authority over the conduct of nonmembers. *See, e.g., El Paso Natural Gas Co. v. Neztsosie*, 526 U.S. 473, 482 n.4 (1999) (distinguishing *Strate* on ground that "the events in question here occurred on tribal lands"); *Wilson v. Marchington*, 127 F.3d 805 (9th Cir. 1997), *cert. denied*, 523 U.S. 1074 (1998); *Montana Dep't of Transp. v. King*, 191 F.3d 1108 (9th Cir. 1999); *Burlington Northern R.R. v. Red Wolf*, 196 F.3d 1059 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 1964 (2000).[2]

This analytical focus on the tribal/fee land distinction is neither "a coincidence of facts," App. 15a, nor an "arbitrary"

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[2] Fee land owned by non-Indians may comprise a very substantial share of a reservation. *See, e.g., Montana*, 450 U.S. at 548 (28% of Crow Reservation owned in fee by non-Indians); *Brendale v. Confederated Tribes & Bands of Yakima Indian Nation*, 492 U.S. 408, 415 (1989) (fee lands constitute over half of open area of the reservation).

inquiry. *See* App. 25a. Rather, it stems from the limited nature of tribal sovereignty. "[T]hrough their original incorporation into the United States . . . tribes have lost many of the attributes of sovereignty." *Montana*, 450 U.S. at 563. As dependent sovereigns, tribes have substantial authority over their own members, but they do not have similar authority over nonmembers: The "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Montana*, 450 U.S. at 564. Thus, "In the main . . . , 'the inherent sovereign powers of an Indian tribe'—those powers a tribe enjoys apart from express provision by treaty or statute—'do not extend to the activities of nonmembers of the tribe.'" 520 U.S. at 445-46 (quoting *Montana*, 450 U.S. at 565).

Because tribal governments do not enjoy the authority "to determine their external relations," *Montana*, 450 U.S at 564 (citation omitted), their limited powers over nonmembers generally arise from a different source—that of "a landowner's right to occupy and exclude." *Strate*, 520 U.S. at 456. A tribe thus may gain authority over nonmembers present on *tribal* lands because the tribe has authority to exclude them from the lands altogether. *See Montana*, 450 U.S. at 559; *Strate*, 520 U.S. at 454. However, tribal regulation of nonmembers "on lands no longer owned by the tribe bears no clear relationship to tribal self-government or internal relations . . . ." *Montana*, 450 U.S. at 564. A tribe's loss of a landowner's "right of absolute and exclusive use and occupation . . . implies the loss of regulatory jurisdiction over the use of the land by others." *South Dakota v. Bourland*, 508 U.S. 679, 689 (1993). Thus, "[r]egarding activity on non-Indian fee land within a reservation, *Montana* delineated—in a main rule and exceptions—the bounds of power tribes retain to exercise 'forms of civil jurisdiction

over non-Indians.'" *Strate*, 520 U.S. at 453 (citation omitted).

Instead of simply applying the general rule of *Montana* to the conduct on fee land at issue here, the court of appeals set forth its own balancing test, in which it purported to weigh "(1) the status and conduct of the nonmembers and (2) the nature of the inherent sovereign powers the tribe is attempting exercise, its interests, and the impact that the exercise of the tribe's powers has upon the nonmember interests involved." App. 25a. In its view, this multi-factor test "leaves the Supreme Court's Indian law jurisprudence more cohesive and intelligible," *id.*, because it "rejects the arbitrary factual basis of fee status as the determinative factor of the *Montana* standard." *Id.* No other court has found it necessary to elaborate on *Montana* and *Strate* in this manner.

The court of appeals apparently thought its test was desirable as a means of harmonizing those decisions with *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130 (1982). In *Merrion*, this Court examined the power of an Indian tribe to impose a severance tax on oil and gas production resulting from leases *on tribal trust land*. *See id.* at 133 ("the reservation contains 742,315 acres, all of which are held as tribal trust property"); *id.* at 135-36 (severance tax imposed "on oil and gas production on tribal land"). The *Merrion* Court relied upon *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), an earlier case that had also involved a tax on transactions on tribal land. Borrowing from *Colville*, the *Merrion* Court reasoned that the "'power to tax transactions *occurring on trust lands* and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or by necessary implication of their dependent status.'" 455 U.S. at 137 (emphasis added) (citation omitted). Thus, where a nonmember does business with the tribe or its members on

tribal lands, a tribe may tax the nonmember's conduct. This holding is, of course, perfectly consistent with the distinction drawn in *Montana* between fee lands and tribal lands and needs no further harmonization. By ignoring this distinction, the court of appeals seriously misapplied the case law.[3]

In any event, the novel balancing test adopted by the court of appeals is neither more "intelligible" nor more practical than the rules laid down by this Court. That test is "a sliding scale, balancing the impact of the activity on the tribe with the severity of the tribe's proposed regulation, taxation or other imposition of jurisdiction." App. 20a. The court of appeals did not explain how one might measure either the "impact of the [nonmember's] activity on the tribe" or the "severity" of the tribe's proposed tax. Nor did it explain how courts or tribes might balance these essentially imponderable factors against one another.

Thus, at least in the area of taxation, the court of appeals effectively replaced *Montana*'s simple rules for tribal regulation of nonmembers with its own multi-factor balancing test. But *Montana* itself eschewed the need for a separate test for tribal taxation of nonmembers. *Montana* explicitly referred to taxation as an example of regulation that may, under proper circumstances, fall within the consensual relationships exception. 450 U.S. at 565 ("tribe may regulate, *through taxation*, licensing, or other means," nonmember activities that arise out of consensual relationships with the

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[3] The court of appeals also relied heavily on *Buster v. Wright*, 135 F. 947 (8th Cir. 1905), *appeal dismissed*, 203 U.S. 599 (1906). But much of the language of *Buster* on which the court of appeals relied—the portions invoking the concept of territorial sovereignty—has been rejected by this Court. *Montana* cites *Buster* only as an example of the first *Montana* exception. *Buster* thus has no applicability where tribal regulation is directed at parties, like Atkinson Trading's overnight guests, who have *no* contractual or commercial arrangements with a tribe or its members.

tribe or its members) (emphasis added). By including certain taxes in its exceptions, *Montana* makes clear that taxation falls within its general rule that tribes have been divested of their powers over nonmembers on non-Indian land. *See Big Horn*, 219 F.3d at 952. *Strate* confirmed that *Montana* applies to *all* questions of tribal civil jurisdiction over non-Indians—whether regulatory, adjudicatory or taxation—describing *Montana* as "the pathmarking case concerning tribal civil authority over nonmembers." *Strate*, 520 U.S. at 445.

The court of appeals' confusion concerning the relationship between *Montana* and *Merrion* requires clarification from this Court. The area of taxation is too important to both tribes and non-Indians who transact business on reservation fee land to be left subject to vague balancing tests. Moreover, the test proposed by the court of appeals might, by its terms, be read to apply to *all* tribal regulation, not simply taxation. It thereby contains the potential to disrupt nonmember conduct on fee land in a variety of contexts. This egregious failure to follow the established framework of this Court should be addressed immediately.

B. In Applying the "Consensual Relationship" Exception, the Court of Appeals Eviscerated This Court's Decision in *Strate*.

The court of appeals also erred profoundly in its application of *Montana*'s consensual relationship exception. Analyzing this exception through the filter of its balancing test, the court of appeals held, "The burden imposed on Appellant's guests is not disproportionate to the benefits they received by availing themselves of Navajo tribal services, including tourist services." App. 32a. The court thereby found a consensual relationship where hotel guests had absolutely no "commercial dealing[s], contracts, leases, or other arrangements" with the tribe or its members. *See*

Montana, 450 U.S. at 565. The lower court's misinterpretation of the consensual relationship exception would—contrary to this Court's admonition—"severely shrink the rule." *See Strate*, 520 U.S. at 458.

The district court made a factual finding sufficient to conclude that *Montana*'s consensual relationship exception was not met in this case: "No explicit consensual relationship was created between the Tribe and the guests, such as would be present if the guests engaged in commercial transactions with the Tribe or its members." App. 65a. Notwithstanding this finding, the court of appeals reasoned that non-Indian guests at the Trading Post had "implicitly" consented to imposition of the tax by virtue of their staying on the Reservation. App. 29a ("[T]he consensual relationship exists in that the nonmember guests could refrain from the privilege of lodging within the confines of the Navajo Reservation and therefore remain free from liability for the Navajo Hotel Occupancy Tax."). The guests of the Trading Post, the court observed, benefit from potential "police, fire, emergency medical, and tourist services provided by the tribe . . . ." App. 27a.[4]

This reasoning misses the point of *Strate*. The driver in *Strate* could also have refrained from passing through the reservation. That driver could also have potentially benefited from emergency police and medical services provided by the tribes. Indeed, *Strate* specifically commented on the possibility of tribal police patrolling state highways passing through the reservation: "We do not here question the authority of tribal police to patrol roads within a reservation, including rights-of-way made part of a state highway . . . ." *Strate*, 520 U.S. at 456 n.11. Nevertheless, the *Strate* Court

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[4] As the Judge Briscoe points out in dissent, there is little record support for the conclusion that the Tribe has ever provided *any* actual services to non-Indian guests at the hotel. *See* App. 47a.

did not consider the possibility of emergency and police services to the non-Indian defendant sufficient enough to give rise to a consensual relationship with the tribes. *See id.* at 456-57. If the possibility of emergency services is insufficient to support tribal jurisdiction after an automobile accident, it certainly is insufficient where a non-member is simply spending the night on the reservation.

The lower courts here analogized the "implied consent" granted by a non-Indian guest at the hotel to a driver on a New Mexico road, who, by virtue of driving in New Mexico, is "deemed to have given implied consent to breath tests for alcohol." App. 28a. But this analogy is misplaced, for it presumes the answer to the very jurisdictional question at issue. A driver present in New Mexico is subject to a breathalyzer statute because the driver is subject to the laws of New Mexico. The driver is subject to the laws of the State because physical presence within a State is sufficient to subject an individual to that State's jurisdiction. *See, e.g., Burnham v. Superior Court of California*, 495 U.S. 604, 619 (1990) ("jurisdiction based on physical presence alone constitutes due process"). The same broad territorial jurisdiction does not apply to Indian reservations; as *Montana* and *Strate* demonstrate, mere presence of a non-Indian on the reservation does not subject the non-Indian to tribal regulation. *See Colville*, 447 U.S. at 165 (Brennan, J., concurring in part and dissenting in part) ("it is now clear that Indian reservations do not partake of the full territorial sovereignty of States or foreign countries").[5]

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[5] Similarly, the court of appeals was wrong to rely on an A.L.R. annotation collecting constitutional challenges to state and local hotel occupancy taxes. App. 30a-31a (citing Noralyn O. Harlow, Annotation, *Tax on Hotel-Motel Room Occupancy*, 58 A.L.R.4th 274, 282 (1987)). None of the challenges was predicated on a lack of sovereignty over the person of the hotel guest. The single case in the annotation that applied a

The court of appeals also suggested that the tax was appropriate because "the tribe accommodates the activity of Appellant and its guests on the reservation." App. 29a-30a. Under its view, "'commercial dealing . . . or other arrangements' may give rise to tribal jurisdiction under the consensual relationship exception." *Id.* (citation omitted). However, what this Court said was that "consensual relationships *with the tribe or its members*" could give rise to tribal taxing authority. *Montana*, 450 U.S. at 565 (emphasis added). By isolating language from its context, the court of appeals adopted an erroneous legal principle.

It is also a dangerous one. If the "potential" receipt of services from the tribe were a sufficient basis for tribal authority over a nonmember, then all nonmembers, wherever and however briefly located on a reservation, would be at risk of tribal jurisdiction. Any time a person passes through an Indian reservation, there is a possibility that the person will benefit from some type of tribal service. Thus, this holding of the court of appeals profoundly undermines the precise holding in *Strate*. This improperly expansive theory of tribal authority warrants review in its own right.

II. THE TENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER LOWER FEDERAL COURTS

In light of the Tenth Circuit's substantial departure from established law, it is not surprising that its decision conflicts, both in the standard applied and in the result reached, with

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"benefits/burdens" test had nothing whatsoever to do with that issue. Rather, it examined whether a county hotel occupancy tax "constituted a taking of private property without due process of law." Harlow, *supra*, at 291 (citing *Allegheny County v. Morzo*, 509 Pa. 26, 500 A.2d 1096 (1985)). It sheds no light on the authority of a tribe to tax the nonmember guests of a hotel on fee land.

decisions of other federal courts. In an opinion issued shortly after the Tenth Circuit's decision here, the Ninth Circuit held that the Crow Tribe lacked the power to impose an ad valorem tax on non-Indian utility property on rights-of-way passing through the reservation. *Big Horn County Elec. Coop., Inc. v. Adams*, 219 F.3d 944 (9th Cir. 2000). Reasoning that the rights-of-way were the equivalent of fee land under the rule of *Strate*, the court held that *Montana*'s general presumption against tribal regulation over non-members applied. *Id.* at 950.

After finding that neither of the *Montana* exceptions were met by the tax at issue, the *Big Horn* court turned to the tribe's argument, identical to that made by the Navajo Nation below, that *Merrion* and *Colville* established a different rule for tribal taxation of nonmembers based on the "inherent sovereign authority" of the tribe. *Id.* at 952. But unlike the Tenth Circuit in this case, the *Big Horn* court eschewed any reliance on *Merrion* or *Colville* in a situation involving non-Indian land: "While both cases contain broad language regarding tribal taxation powers, neither case abrogates *Montana*'s main rule." *Id.* Although *Colville* "is a tribal tax case," the Ninth Circuit reasoned, "it directly address[ed] only Indian taxation power over transactions occurring on Indian land . . . ." *Id.* Similarly, *Merrion* "did not directly address a tribe's power to tax property located on the equivalent of non-Indian fee land." *Id.* Instead, the court concluded, "to the [extent] *Merrion* expresses an opinion about a tribe's taxation of property located on non-Indian fee land, its language indicates that such a tax would be an impermissible extension of tribal jurisdiction." *Id.*

The discord between the Ninth and Tenth Circuits is all the more significant because the Ninth Circuit, in the wake of *Strate*, overruled its own prior precedent to articulate its different approach. In 1991, the Ninth Circuit issued a decision making the same mistake made by the lower court

here. *See Burlington Northern R.R. v. Blackfeet Tribe*, 924 F.2d 899 (9th Cir. 1991), *cert. denied*, 505 U.S. 1212 (1992). *Blackfeet Tribe* relied heavily on *Merrion* for the proposition that the power to tax is a fundamental attribute of sovereignty, no matter whether the tax arises on tribal or non-Indian land. *See id.* at 902. *Big Horn* expressly overruled *Blackfeet Tribe*, reasoning that the *Montana* analysis applies to all exercises of tribal jurisdiction over nonmember conduct on fee land and its equivalent. *See Big Horn*, 219 F.3d at 953. In light of *Strate*, the court reasoned, the *Blackfeet Tribe* decision's "failure to apply *Montana* undermines its precedential value." *Id.* "[T]he tax cannot be justified on the basis of the Tribe's inherent sovereign authority . . . because the tax is no longer on property classified as Indian land." *Id.*

Big Horn recognizes *Montana* as the governing rule for tribal taxation of nonmember conduct on fee land. It also rejects *any* reliance on *Merrion* and its "advantages of a civilized society" standard as a basis for determining tribal civil authority over nonmember conduct on fee land. The Tenth Circuit decision in this case plainly rejected that approach. The bright lines recognized by the Ninth Circuit contrast with the Tenth Circuit's "case-by-case approach" in this case. *See* App. 17a. The standards applied by the two circuits irreconcilably conflict.

That conflict is exemplified by a pair of cases in which the United States District Court for the District of Montana held that nonmembers on fee land could not be subjected to a Crow tribal "resort tax" identical in relevant respect to the Navajo HOT. *See In re Haines*, 245 B.R. 401 (D. Mont. 2000); *Rose v. Adams*, No. CV. 99-126-BLG-JDS (D. Mont. Aug. 7, 2000) (App. 125a-134a). The challenged tribal ordinance imposed a four percent resort tax on plaintiffs' "gross receipts from all goods and services sold or used on the Reservation in connection with a resort business," defined to include campgrounds, dude ranches, guest ranches, hunting

and fishing lodges, bed and breakfast establishments, souvenir shops, hotels, motels and other lodging or camping facilities. *See* Crow Tribal Code tit. XII, ch. 4, § 4.02 (App. 136a-37a). In both cases, non-Indian businesses that owned and operated lodging and recreational facilities on fee land within the Crow Reservation challenged the resort tax as exceeding the tribe's authority over nonmembers. *See In re Haines*, 245 B.R. at 403; *Rose*, Order at 2 (App. 126a).

In each case, the court concluded that the tribe's interest in the transactions at issue was insufficient to support the tax under *Montana*. *See Rose*, Order at 8 (App. 130a) (tribe "cannot point to, nor does there exist any consensual relationship between plaintiffs and the Tribe or its members which would allow the Tribe to tax transactions between nonmembers and the [nonmember] plaintiffs which occur on plaintiffs' non-Indian fee land"). The Montana district court rejected the Crow Tribe's reliance on *Merrion* and its "advantages of a civilized society" argument, reasoning that

> the 'advantages of a civilized society' argument requires that the nonmember first be within the tribe's jurisdiction before the tribe can exercise its inherent sovereign authority to tax . . . . The advantages of a civilized society theory is not a jurisdictional test, but is instead simply a recognition of the source of a tribe's power to tax once jurisdiction over a nonmember has been established.

In re Haines, 245 B.R. at 406; *see also Rose*, Order at 10 (App. 131a-132a). Thus, "[a]s *Big Horn County Electric* instructs, the inherent sovereign power of an Indian Tribe to tax nonmembers is not exempt from [*Montana*'s] general rule and its exceptions." *Rose*, Order at 4 (App. 128a). Finally, in applying *Montana's* exceptions, the court rejected the tribe's argument that the "voluntary presence" of nonmembers on the reservation gives rise to a consensual relationship with the tribe. "[S]imple presence of the plaintiffs' customers on the

reservation does not constitute a consensual relationship between the customers and the Crow Tribe . . . ." *Rose*, Order at 8 (App. 130a).

Big Horn, *In re Haines* and *Rose* demonstrate the discord caused by the court of appeals' decision in this case. That discord has real and immediate consequences for non-Indians on Indian reservations. One need look no further than the Navajo Indian Reservation to see them. The Reservation is located in Arizona, Utah and New Mexico; thus, it spans *both* the Ninth and Tenth Circuits. The obligation of non-Indians to pay the tax will depend upon the part of the Reservation in which they spend the night. The obligation of Atkinson Trading to collect the tax for the relevant years is the result only of the district in which it chose to sue. Had Atkinson Trading chosen to sue in Arizona, where the hotel is located, instead of New Mexico, where Atkinson Trading was incorporated, the result in this case would evidently have been different, controlled by Ninth Circuit law.

Outside of the Navajo Nation, the lower court's decision opens the door to a vastly expanded range of tribal taxation of nonmembers. Because non-Indians have no say in tribal government, they are an easy target for tribal taxation. As a result, tribes throughout the country seek to subject nonmembers to numerous types of taxation, including hotel and resort taxes like the Navajo tax at issue here.[6] Some of those taxes are even imposed exclusively on nonmembers, with tribal members completely exempted from the burden of the tax.[7] Some are imposed on railroads and pipelines—

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[6] *See, e.g.*, Eastern Band of Cherokee Tribal Code § 105-30 ("privilege" tax imposed on "operators of hotels, motels, tourist homes, tourist camps, campgrounds," *etc.*) (App. 135a); Crow Tribal Code tit. XIII, ch. 4 (resort tax on lodges, hotels, campgrounds, *etc.*) (App. 136a-137a).

[7] *See, e.g.*, Red Cliff Band of Lake Superior Chippewas Code § 16.2.1 (imposing gross receipts tax on "every non-member engaged" in the

interstate businesses that are captive on the reservation as a result of immovable investment.[8] Under the tribal codes, nonmembers generally are subjected to these various taxes simply by virtue of their presence on the reservation. As Judge Briscoe noted in dissent, the Tenth Circuit's sliding scale test "makes it substantially easier for a tribe to establish jurisdiction over a nonmember" in order to impose these taxes. App. 42a.

The Tenth Circuit's easily-satisfied approach to "consent" could also generate *more* taxes on nonmembers on fee land. Moreover, as tribes become more reliant on income derived from taxes on nonmembers, the misdirection of the law effected by the Tenth Circuit will become more difficult to correct without disruption to all concerned.

The sliding-scale test adopted by the Tenth Circuit creates uncertainty and will undoubtedly encourage litigation. That litigation is likely to be particularly costly as a result of the requirement that tribal remedies be exhausted prior to access to a federal court. *See Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9 (1987); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). This litigation, for example, has already lasted seven years as it traveled through four layers of

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operation of a restaurant, bar, liquor store, hotel, motel, campsite, marina, theater, *etc.*), *available at* <http://thorpe.ou.edu/codes/redcliff/CH16.html>.

[8] *See* Crow Tribal Code tit. XIII, ch. 2 (railroad and utility property tax) (App. 136a); Three Affiliated Tribes of Fort Berthold Reservation Tribal Tax Code §§ 701 *et seq.* (possessory interest tax on all railroad and utility property on reservation) (App. 138a); Assiniboine & Sioux Tribes of Fort Peck Reservation Tribal Tax Code §§ 301 *et seq.* (utilities tax on all railroad, communications, telegraph, telephone, or pipeline property on the reservation) (App. 139a); Blackfeet Tribal Ordinance Providing For A Possessory Interest Tax, No. 80, *as amended by* Resolution No. 213-87 (1987) (possessory interest tax in all non-exempt possessory interests on the reservation including utility and railroad property) (App. 140a).

courts. And yet the Tenth Circuit's opinion leaves essentially uncertain the fates of myriad other tribal taxes, such as sales, income and transaction taxes, that may be imposed on nonmembers in their homes and commercial establishments on fee lands. Each of these taxes, as applied in different factual circumstances, will also need to be tested against the balance of factors contemplated by the Tenth Circuit.

Unrestrained tribal taxation of nonmembers also has long-term costs for relations between the tribes and the remainder of our society. This Court has warned against "an extension of tribal authority over those who have not given the consent of the governed that provides a fundamental basis for power within our constitutional system." *Duro v. Reina*, 495 U.S. 676, 694 (1990). By finding "consent" in a nonmember's mere presence on the reservation and the acceptance of the "benefits of a civilized society," the Tenth Circuit has opened the door to almost unfettered tribal taxation and regulation of persons who have no ability to participate in tribal government. This lack of consent, combined with a vague test and the need for extensive litigation, is a formula for increasing tension between the tribes and the communities of non-Indians who live among and around them.

The issue raised here clearly warrants Supreme Court review. This Court has never addressed a tribal tax imposed on nonmembers on fee land. The authority of the tribes to impose a tax in these circumstances has proved controversial within the Tenth Circuit, where it led to both a split panel decision and a denial of *en banc* rehearing by an equally divided court. It has also proved difficult in the Ninth Circuit, which overruled its own precedent to take a position contrary to that of the Tenth Circuit. Between them, these two circuits encompass the American West. They include a great number—probably the majority—of reservations in

which tribal taxes might be in issue.[9] Given their divergence in approach, the problem of tribal taxation of nonmembers is present here and now.[10]

This case presents the ideal vehicle for resolving this issue. It has satisfied the rigorous requirement for exhaustion of tribal remedies. Its facts are relatively clear. They present the next logical step beyond the plight of the truck driver in *Strate*—a tax on nonmembers visiting a national park who stop for the night on fee land without engaging in any commercial transactions with the Tribe. These paradigmatic facts should permit the Court to analyze with clarity the scope of tribal taxation over nonmembers on fee land.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

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[9] According to 1990 census figures, 76.8% of Native Americans living on reservation and tribal trust lands live in States falling within the Ninth and Tenth Circuits. *See* Bureau of the Census, Racial Statistics Branch, Population Division, *American Indian and Alaska Native Areas* 10-21 (June 1991).

[10] Because Indian reservations are concentrated in a few federal circuits, this Court has historically granted certiorari on Indian law issues based on a more limited experience in the courts of appeals. *See* Petition for Writ of Certiorari at 13-15, *Strate v. A-1 Contractors*, 520 U.S. 438 (1997 (95-1872) (noting circuit split between Eighth and Ninth Circuits); Petition for Writ of Certiorari, *El Paso Natural Gas v. Neztsosie*, 526 U.S. 473 (1999) (No. 98-6) (noting parallel decisions of Ninth and Tenth circuits).

Respectfully submitted,

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